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No. 794

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
Petitioner,

v.

BROTHERHOOD OF RAILROAD TRAINMEN and R. E. CARROLL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONER

ERNEST PORTER
KENNETH D. BARROWS
MARTIN M. LUCENTE
GEORGE L. SAUNDERS, JR.
11 South La Salle Street
Chicago, Illinois 60603
Attorneys for Petitioner

SIDLEY & AUSTIN
Of Counsel

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REPLY BRIEF FOR PETITIONER

ARGUMENT

I. Reversal of the Judgment of the Court of Appeals Would not be Legislation by the Court, but Rather a Correct Construction of the Statute Involved in This Case.

Both the respondents and the Railway Labor Executives' Association (RLEA) make basically the same argument to support the Court of Appeals' holding that venue against the BRT could not be laid in the district of Colo-

rado. The controlling statute, they contend, provides for venue as against an unincorporated labor union subject to the Railway Labor Act only in the district where it has its principal place of business; and any judicial decision permitting a broader venue would amount to legislation (Resp. Brief, pp. 10, 16, 17-18, 19, 21, 24-29; RLEA Brief, pp. 4, 6, 7, 8, 15-16, 24, 26). Thus it is said that petitioner's arguments in this Court "constitute purely legislative reasons" (Resp. Brief, p. 16). The opinion of the Court of Appeals in *Rutland Railway Corp.* v. *Brotherhood of Locomotive Engineers*, 307 F.2d 21 (2d Cir. 1962), cert. den., 372 U.S. 954 (1963), is called "outright legislation" (Resp. Brief, p. 10) and an "extreme example of judgment by fiat" (RLEA Brief, p. 16).

This argument by respondents and the RLEA is completely fallacious. The question decided in the *Rutland Railway* case—the same question that is now before this Court—is not one of legislation, but a matter of interpreting an existing statute.

In Section 1391(b) of the Judicial Code (28 U.S.C. § 1391(b), the general venue statute, Congress has provided that federal-question actions may be brought "in the judicial district where all defendants reside." Neither the venue statute nor any other statute relating specifically to actions against labor unions subject to the Railway Labor Act defines residence for such unincorporated associations.

Respondents and the RLEA concede, as they must, that the BRT and similar unions are subject to suit in the federal courts (Resp. Brief, p. 16; RLEA Brief, p. 8). Unquestionably, the BRT "resides" *somewhere*. Respondents and the RLEA claim that the BRT's residence is at Cleveland, Ohio, where it has its principal place of business (Resp. Brief, pp. 15, 32; RLEA Brief, pp. 3, 26). Congress, however, has neither fixed the residence of the BRT at its headquarters in Cleveland, nor stated that an

unincorporated union has but one residence. Petitioner submits that, within the meaning of Section 1391(b), the BRT "resides" in the district of Colorado. The issue thus framed is the construction of Section 1391(b), as it applies to unincorporated labor unions subject to the Railway Labor Act.

That issue is the one decided in the *Rutland Railway* case, where the Court of Appeals for the Second Circuit held that for venue purposes the residence of the union should "include all the judicial districts in which the unincorporated entity is doing business" (307 F.2d at 29). This holding was not legislation, but a construction of Section 1391(b) based on sound reasons and in accordance with the ratio decidendi of Judge Hand's opinion in *Sperry Products* v. *Association of American Railroads*, 132 F.2d 408 (2d Cir. 1942). The same issue is now before this Court; and in seeking reversal of the Court of Appeals, petitioner seeks not legislation, but a correct interpretation of an Act of Congress. Such interpretation is clearly within the proper scope of judicial decision.

We have shown in our principal brief the reasons why Section 1391(b) should be construed so as to permit venue of petitioner's action against the BRT to be laid in the district of Colorado—a district where occurred the unlawful strike which is the subject matter of this case, where petitioner conducts most of its operations, where most of petitioner's employees represented by the BRT reside and work, where the BRT's General Chairman Carroll resides and has his headquarters, and where petitioner and the BRT conduct collective bargaining negotiations and enter into collective agreements. On the basis of judicial opinion prior to 1948 and the enactment in 1947 of Section 301 of the Labor-Management Relations Act(29 U.S.C. § 185), we have shown the intent of Congress, in the 1948 enactment of Section 1391, to make unions, like corporations, subject to suit wherever they

are "doing business." The "business" of a union is representing employees.

This case is completely unlike *Steelworkers* v. *Bouligny*, 382 U.S. 145 (1965), which the Court of Appeals erroneously thought decisive, and on which respondents and the RLEA rely (Resp. Brief, pp. 25-29; RLEA Brief, pp. 21-24). The Court in *Bouligny* was dealing with a point of jurisdiction—not venue—which it held to be "a matter for legislative consideration" (382 U.S. at 147). The instant case, as shown above, is a matter of statutory construction. It lies, moreover, in an area of law that Congress has deliberately left to the federal courts.

The rule that unincorporated unions "are suable in the Federal courts" derives not from an Act of Congress, but from the decision of this Court in *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344, 391 (1922). And when Congress enacted the Railway Labor Act in 1926, it made no specific provision for enforcement of important duties imposed on unions as well as employers, but left it to the courts to develop "enforcement by proceedings appropriate to each" legal obligation. *Texas & N.O.R. Co.* v. *Brotherhood of Railway Clerks*, 281 U.S. 548, 569 (1930). That the courts have done. E.g., *Brotherhood of Railroad Trainmen* v. *Chicago River & I. R. Co.*, 353 U.S. 30, 41-42 (1957). And this Court may, with complete consistency, so construe Section 1391(b) as to permit actions to be brought against unions which violate the Railway Labor Act wherever such unions are engaged in representing employees under that Act.

II. The Claim That Venue Should be Restricted to Cleveland, Ohio, Is Unsound Both as a Matter of BRT "Residence" and Under Public Law 89-714.

The arguments of respondents and the RLEA with respect to Public Law 89-714 highlight the unreasonably narrow limitations which they would have the Court im-

pose on the venue of petitioner's action. Public Law 89-714, approved on November 2, 1966 (80 Stat. 1111), became effective after petitioner's petition for rehearing by the Court of Appeals had been denied. It amends Section 1391(b) to provide that venue in nondiversity cases is proper not only in the judicial district where all defendants reside, but also in the judicial district "in which the claim arose."

According to respondents and the RLEA, however, Public Law 89-714 could have no effect upon venue for petitioner's action. RLEA contends that "the strike on which the present cause of action rests was called by the respondent Brotherhood at its principal place of business in Cleveland, in the Northern District of Ohio. Accordingly that is where the present claim arose within the meaning of 28 U.S.C. § 1391(b) as amended" (RLEA Brief, p. 20). Respondents concur, adding the claim that part of the strike occurred in Utah, so that petitioner "can only put its claim into a single package for venue purposes by suing the BRT where it 'resides'" (Resp. Brief, p. 15).

Thus respondents and the RLEA insist that liability for an unlawful strike which occurred in Colorado, which involved petitioner's Colorado employees and which disrupted the operations of a railroad operating primarily in Colorado, may not be asserted in the judicial district of Colorado, but must be pursued some 1300 miles away at Cleveland, Ohio, because the offending union maintains its headquarters in the latter district.* This is claimed to be the proper result not only under the venue requirement of residence but also under the amendment which

* Respondents do state that petitioner's action could have been brought in the District of Columbia (Resp. Brief, p. 31). Assuming the BRT is "resident or found" within the District of Columbia as required by the local venue statute (D. C. Code, § 11-521 (1966 Supp.)), that jurisdiction is even more remote from petitioner's action than Cleveland, Ohio.

makes venue proper in the district in which the claim arises.

This Court in *Pure Oil Co.* v. *Suarez*, 384 U.S. 202 (1966), recently had occasion to note that the venue provisions of Section 1391 constituted "a response to a general conviction that it was 'intolerable if the traditional concepts of "residence" and "presence" kept a corporation from being sued wherever it was creating liabilities'" (384 U.S. at 204, note 2).* It is precisely such an "intolerable" situation which respondents and the RLEA urge this Court to approve. They seek to foster a venue concept which would permit a labor organization to participate in any conceivable action in districts far removed from its headquarters and then to draw venue concepts about it as a shield from prosecution except in the district in which it has chosen to establish its headquarters. It would be difficult indeed to conceive of a position more closely related to the "intolerable" situation which this Court described in the *Pure Oil* case.

In order to create the predicate for their argument in this Court, respondents and the RLEA find it necessary to adopt a theory of the case different from that which the respondent Brotherhood of Railroad Trainmen urged in the District Court. Thus RLEA states in this Court that the strike against the Rio Grande "was called by the respondent Brotherhood" at Cleveland, Ohio (RLEA Brief, p. 20). Respondents say, "The decision to conduct

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* This Court affirmed a decision by the Court of Appeals for the Fifth Circuit, 346 F.2d 890, 896-897 (1964), which stated that:

"There is a shocking inconsistency in a rule of law which permits a corporation to maintain a regular, established place of business in the district in question, transact a substantial amount of business there both before and after the event about which the plaintiff complains and at the time the suit is filed with the expressed intention to continue doing business in such locale, but allows the corporation to insist on a trial of the factual issues in the district in which it is incorporated or in which its principal office is located."

a strike was made by the President of BRT in Cleveland, Ohio" (Resp. Brief, p. 15). Counsel for the respondent Brotherhood, however, assured the District Court during the trial of this case that the strike in question was called "pursuant to a letter that was sent to the Railroad on May 16" (R. 28). The letter to which counsel referred emanated from the Denver headquarters of respondent R. E. Carroll, General Chairman of the Brotherhood of Railroad Trainmen on the Rio Grande and was signed by respondent Carroll and by grand lodge officer Vice President McDonald (R. 147-148). The only connection that this letter has with Cleveland, Ohio, is the indication that a copy of it was sent to Mr. W. P. Kennedy, president of the Brotherhood of Railroad Trainmen at Cleveland, Ohio. It is clear, therefore, that the instrument which precipitated the strike originated in Denver, Colorado, through the joint authority of the General Chairman, a resident of Colorado, and Mr. McDonald, a grand lodge officer present in Colorado at the time. These facts completely contradict the assertion that the strike was called by the Brotherhood at Cleveland, Ohio.

Moreover, respondents and the RLEA fail to explain how the strike could have been called by the Brotherhood at Cleveland, Ohio, in view of the precise provisions of the Constitution and General Rules of the Brotherhood. These provisions clearly require strike authorization by two-thirds of the members of the General Grievance Committee located on the Rio Grande in Colorado, of which respondent Carroll is Chairman, and the concurring authority of the president of the Brotherhood or his designee (Appendix B to Petitioner's Brief, pp. 49-50). In the present case the joint authorization of the Grand Lodge and the General Grievance Committee was apparently accomplished through the letter of May 16 which counsel for the Brotherhood identified as the strike-authorizing document.

Even if it be assumed that the strike was called by the Brotherhood at Cleveland, Ohio, it does not follow that claims based on such a strike arose at Cleveland, Ohio. Neither of the two cases cited for the statement that such claims would arise where the strike was authorized rather than where the strike occurred (Resp. Brief, p. 15; RLEA Brief, p. 20) involved issues even remotely relevant to the point for which the cases are cited. In *Lodge 42* v. *International Brotherhood of Boilermakers*, 324 F.2d 201 (6th Cir. 1963), cert. den., 376 U.S. 913 (1964), the court held that venue of an action against certain labor organizations for wrongfully expelling plaintiffs was not properly laid in the middle district of Tennessee. The court pointed out, in holding that venue was improper, "that neither of the defendants has its principal office in that district and *neither is alleged to have done anything there*" (324 F.2d at 202) (emphasis supplied). It is difficult to perceive how this holding can be deemed relevant in the present situation where the activity, i.e., the strike, upon which liability is predicated occurred in the district in which the suit was brought. In *Coleman* v. *Brotherhood of Railway and Steamship Clerks*, 228 F. Supp. 276 (S.D.N.Y. 1964), plaintiffs sought to challenge the election of certain union officers. The election in question had occurred in California and the union maintained its principal office in Ohio. The action was brought in the Southern District of New York and the court held that since the action had not been brought where the election was held or where the principal office of the Brotherhood was located venue was not proper. This again was a situation in which none of the activity upon which the complaint was based had occurred in the district in which the action was instituted. There is no authority for the position that a claim based on an unlawful strike does not arise in the district in which the strike occurs.

It is also suggested that because petitioner has not invoked the provisions of Public Law 89-714 as "determina-

tive" the amendment is not relevant to the present litigation (Resp. Brief, p. 14; RLEA Brief, p. 20). It must be emphasized first that the statute in question was passed and approved after the Court of Appeals had denied petitioner's petition for rehearing and during the course of the preparation of a petition for a writ of certiorari. Since the amendment does not resolve the question of the residence of unincorporated unions for venue purposes and since the Court of Appeals' decision on this matter appeared to be erroneous, petitioner determined to seek review by this Court.

As our principal brief emphasizes, the question of the residence of unincorporated labor unions for venue purposes continues to be one of great importance with respect to which a decision by this Court is urgently required. Under a correct construction of Section 1391(b), we submit, Public Law 89-714 is not "determinative" because the BRT "resides" for venue purposes in the district of Colorado, and further issues of where "the claim arose" need not be reached. We submit that venue was proper in the district of Colorado without regard to Public Law 89-714, and that no further litigation with respect to venue is necessary.

As the RLEA suggests, however, Public Law 89-714 might well be applicable under the principle of *United States* v. *Alabama*, 362 U.S. 602 (1960) (RLEA Brief, p. 20). Accordingly we respectfully submit that, should this Court hold that the Brotherhood is not a "resident" of the district of Colorado, proper disposition of the case would be a remand for consideration of the propriety of venue in Colorado under Public Law 89-714.

We respectfully urge, nonetheless, that our position on the merits is correct and that the Brotherhood should be held to be a "resident" of the district of Colorado for venue purposes. No other holding can resolve the issue of venue as against unions subject to the Railway Labor

Act consistently with the principal that large national organizations should be subject to suit "wherever they are creating liabilities."

CONCLUSION

For the foregoing reasons and those stated in our principal brief, the decision of the Court of Appeals should be reversed with directions to the Court of Appeals to proceed to a consideration of the issues other than venue which were raised by the appeal from the judgment of the District Court.

Respectfully submitted,

ERNEST PORTER
KENNETH D. BARROWS
MARTIN M. LUCENTE
GEORGE L. SAUNDERS, JR.
Attorneys for Petitioner

SIDLEY & AUSTIN
Of Counsel

April, 1967